

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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BRIEF AND APPENDIX FOR APPELLANT

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

April Term, 1942

No. 8305

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED 970 AUG 31 1942

Joseph W. L. L...

PAUL S. TORRENS, *Appellant*

CLERK

VS.

MRS. JESSIE PROCTOR, To her own use and to the use
of the INTERSTATE INSURANCE COMPANY,
a Corporation, *Appellee*

**Appeal From Order Denying Motion of the District Court
of the United States for the District of Columbia.**

THOMAS B. SCOTT

HARVEY C. BEAVERS

Attorneys for Appellant,

Paul S. Torrens

1420 New York Avenue, N. W.

Washington, D. C.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

CHARLES W. WARDEN, WASHINGTON REPRESENTATIVE,
TOWER BUILDING

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IN THE
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FOR THE DISTRICT OF COLUMBIA.

April Term, 1942

No. 8305

PAUL S. TORRENS, *Appellant*

vs.

**MRS. JESSIE PROCTOR, To her own use and to the use
of the INTERSTATE INSURANCE COMPANY,
a Corporation, *Appellee***

BRIEF FOR APPELLANT.

Jurisdictional Statement.

This was an action brought in the District Court of the United States for the District of Columbia on the 15th day of July, 1940 for damages by reason of alleged negligence in an automobile accident. The suit was brought under the general jurisdiction of the District of Columbia (Title 18, Sec. 44, 1929 Ed.) as stated in the complaint.

On the 23rd day of January, 1942 a motion was entered by defendant to set aside and vacate a consent judgment

under rule 60 B of the Federal Rules of Civil Procedure. (App. Page 3.)

This motion was denied on the 21st day of May, 1942 by the Court below and subsequently this appeal was taken. Appellant relies on the case of Jackson v. Heiser, 111 Fed. 2nd 310, construing Rule 60 B of Federal Rules of Civil Procedure for authority that a denial of such motion is a final decision and hence appealable.

Jurisdiction in this Court is conferred by Title 18, Section 26, 1929 Ed. District of Columbia Code.

Statement of Case.

On July 15, 1940 appellant, Paul S. Torrens, was sued by appellee, Mrs. Jessie Proctor, for alleged negligence in an automobile accident by which her person and property were damaged on March 24, 1940. A denial of negligence was entered by the appellant, Paul S. Torrens, through his attorney, Harold F. Hawken on August 1, 1940. (App. Page 1.)

Subsequent thereto Mr. Hawken suggested to Mr. Torrens that he enter into a consent judgment. Mr. Torrens testified that he strenuously objected to any such judgment and instructed his attorney to have the case heard on its merits. (App. Page 8.) Mr. Hawken testified that there was an agreement on the consent judgment between him and Mr. Torrens. (App. Page 9.)

Mr. Torrens requested the return of the file and correspondence in his case from Mr. Hawken on the grounds, as he testified, that he was dissatisfied with counsel and want-

ed to procure new counsel. (App. Page 7.) This request was granted and the file and correspondence were mailed to Mr. Torrens on November 22, 1941. (Exhibit A, App. Page 6.) Mr. Hawken stated that he thought Mr. Torrens wanted the file for a proposed bankruptcy proceeding. (App. Page 10.)

In the first part of December, 1941, Mr. Torrens secured services of Harvey C. Beavers, attorney, located at 1420 New York Avenue, N. W., to represent him at both pre-trial and the trial of the case itself. Mr. Beavers, in inspecting the docket, found that on the 24th day of November, 1941 a judgment had been entered "by consent of counsel" in the total sum of \$1,250.00, \$1,160.13 for Mrs. Proctor and \$89.87 to the use of the Interstate Insurance Company.

Thereafter on January 23, 1942, Harvey C. Beavers, the appellant's new counsel, filed a motion to vacate and set aside the consent judgment under Rule 60 B Federal Rules of Civil Procedure on the grounds that not only was the consent judgment entered without the knowledge and consent of the appellant but against his specific instructions. (App. Page 3.) Further, it was urged at the hearing of the motion that appellant's former attorney terminated his relationship as attorney and client when he returned the file and correspondence in the case at appellant's request. That the file and correspondence in the case were returned to appellant at his request was undisputed. (App. Page 9.)

Defendant below, Paul S. Torrens, claims that his first knowledge of a consent judgment having been entered against him was when his new attorney, Harvey C. Beavers, contacted him after having inspected the docket at the

Clerk's Office where he had found a judgment "by consent of counsel." (App. Page 8.) That said judgment was entered by his attorney not only without authority but against his specific instructions and further that he terminated services of his attorney, Harold F. Hawken, on November 22, 1941. (App. Pages 7 and 8.)

Appellant, Paul S. Torrens, testified at the hearing of the motion that he always believed that he had a good defense to this suit and had always expressed a desire to be heard in this matter. (App. Page 8.)

STATEMENT OF POINTS.

A. Denial of Motion to Vacate Consent Judgment was error.

1. Court erred in ruling that appellant's former attorney had authority to consent to judgment when evidence establishes that appellant's attorney terminated his relationship as attorney when he returned the file and correspondence to appellant on November 22, 1941.
2. Appearance and consent of attorney to the judgment under the mistaken assumption that he represented appellant and that his client was agreeable, such settlement was a constructive fraud on the Court and vitiated a judgment entered thereon.
3. Court findings that client did not discharge his attorney prior to consent judgment was contrary to the clear weight of the evidence.
4. Appellee's rights will not be prejudiced by allowing this case to proceed to trial and, should she have a meritorious claim, justice will be served at Trial Court.

5. "Consent judgment" sensibly impairs appellant's substantial rights and interests presented and involved in the litigation. Hence, appellant will be denied due process of law should it be allowed to stand.
6. Clear weight of evidence shows that no one was authorized to act for appellant in regard to a "consent judgment."

SUMMARY OF ARGUMENT.

I & II.

The documentary evidence shows that the appellant's former attorney, Harold F. Hawken, terminated his relation of attorney and client when he returned to the appellant, at his request, the file and correspondence in the case on November 22, 1941. That he returned the file and correspondence to appellant at his request is undisputed. This evidence together with appellant's own testimony establishes the termination of the agency. This evidence was not met by the appellant's former attorney and hence the Court erred in ruling that he had authority to consent to the judgment.

The evidence shows that appellant's former attorney was mistaken as to a fact essential to his right to the making of the settlement, to-wit, consent of his client. If he assumed the right by the general employment, the assumption was not well founded. It does not appear from the record that knowledge was conveyed to the Court at the time of the submission of the consent judgment that counsel had returned the file and correspondence in the case to the appellant. This omission, although there is no evidence of intentional fraud, is a constructive fraud on the Court and vitiated a judgment entered thereon.

III & IV.

Appellant's own testimony that he was dissatisfied with counsel as he did not like the way the case was being handled, "these suggestions that he consent to a judgment," together with the documentary evidence of the return of the file and correspondence of the case establishes the discharge of counsel. Appellant had right to change his attorney when he saw fit. Appellant had the absolute right to discharge his attorney so as to revoke his authority and terminate relations which included the right to make a change or substitution of attorneys at any stage of the proceedings either with or without cause. The clear weight of the evidence establishes the exercise by appellant of this right.

Appellee's rights in the instant case will not be prejudiced by allowing this case to proceed to trial because, if she has a meritorious claim, not only will she be given an opportunity for her rights to be asserted, but she will be compensated accordingly.

V & VI.

The consent judgment was taken by the consent of the appellant's former attorney and it appears from the record that such consent was pursuant to an agreement which sensibly impairs the appellant's substantial rights. The evidence established that the consent was without authority, hence, unless appellant is given an opportunity to present his case as to his liability and responsibility, to which he believes he has a valid defense, he will be denied due process of law.

The evidence shows that no express authority was given appellant's former attorney and, since the power of an at-

torney is not coequal, coextensive or the equivalent of his client, he was not in a position to consent to a judgment. Further, the evidence shows a termination of authority and the agency on November 22, 1941. Thus, no one was authorized to consent to a judgment on November 24, 1941.

ARGUMENT.

I & II.

The documentary evidence presented in the case consists of a letter which was sent on November 22, 1941 to the appellant at his request, enclosing the file and correspondence in the case. (App. Page 7. Exhibit A, Page 6.) That this letter with the file and correspondence was sent at appellant's request, Mr. Hawken himself admitted. (App. Page 9.) The only evidence presented in an attempt to explain away this return of the file and correspondence was given by Mr. Hawken when he said that he thought Torrens wanted the file in connection with the proposed bankruptcy proceedings. (App. Page 10.) It is to be noted that Mr. Hawken said he *thought* Torrens wanted it for a bankruptcy proceeding. In other words, Mr. Hawken wasn't sure of his own reasoning when he tried to explain his actions. No evidence was introduced by Mr. Hawken to support any assertions of an overt act by Mr. Torrens towards attempting to enter into bankruptcy. What need had Torrens for the file if he wanted to go into bankruptcy? The answer must be in the negative—none.

The appellant does not at this time pass on the question of who should have the burden of establishing want of authority. Suffice it to say, that in *Scott v. Moore*, 52 Okla. 200, 152 Pac. 823, it was stated that when a client denies

authority to compromise a matter the burden is on the attorney to show by a preponderance of the evidence that he was given such authority. Also *Dalton v. West End Railroad*, 159 Mass. 221, 34 N. E. 261 and *Gaston v. All Russia, et al.*, 224 N. Y. S. 522. Whereas the opposite view was taken in the case of *People's Bank of Burnsville v. Penland*, 206 N. C. 323, ^{173 S. E. 345} ~~247 N. W. 852~~, holding that the burden devolved on the one asserting want of authority. Even assuming the latter case to be the better rule, which we do not admit, appellant contends that he discharged the burden by the introduction of the documentary evidence together with his own testimony. Mr. Hawken did not meet this evidence through his own testimony or by any other evidence presented.

The evidence shows that appellant's former attorney was mistaken as to a fact essential to his right to the making of the settlement, to-wit, consent of his client. The special authority necessary to the execution of such consent agreement was lacking prior to the termination of the agency. Mr. Hawken produced no other evidence except his own statement that Torrens had agreed by telephone to the judgment. Hawken admitted under cross-examination that he had no correspondence to or from himself concerning a consent judgment. (App. Pages 9 & 10.) Nor was any authority to make a settlement in the form of a consent judgment to be derived from the fact that he thought it was the wisest or most expedient course to pursue, as he indicated in his testimony to the effect that the proposed settlement was modest and substantially less than plaintiff could reasonably expect to recover on trial. (App. Page 10.) *Siefert v. Gallet*, 159 Minn. 131, 198 N. W. 664. As was stated in *National Bread Company v. Bird*, 226 Ala. 40, 145 So. 462, the weight of authority is that express authority is neces-

sary by the attorney in order to compromise the client's cause of action. Also, *United States v. Beebe*, 180 U. S. 343, 21 Supreme Court 371. In *Morgan, et al. v. Hood, et al.*, 211 N. C. 91, 189 S. E. 115, it was stated that it is well settled that an attorney-at-law has no authority to consent to a judgment which will be binding on his client unless he has been specially authorized so to do by his client. In other words, under general employment Hawken could not deprive his client of a trial.

Mr. Hawken, after returning, on November 22, 1941, the file and correspondence in the case, which means in the customary lawyer's jargon "terminating your interest therein," did not apprise the Court of this fact just two days later at the time of the submission of the consent judgment. Even though there is no evidence in the record showing intentional fraud, this omission was a constructive fraud on the Court and vitiated a judgment entered thereon. A similar principle is promulgated in *Northern v. Vonderharr*, 189 Iowa 43, 175 N. W. 967. It would do well to note that, although Mr. Hawken stated that this agreement as to a settlement had been imparted to the Court at the various scheduled pre-trial hearings and made a basis for a continuance for convenience of counsel, there is nothing in the record of any pre-trial minutes indicating that such was the case. In fact, there are no pre-trial memoranda in the record at all. The appellant contended then and reaffirms his contention here that he had neither knowledge of any pre-trial hearings or of any submission of a consent judgment. The appellant further contends that, when Hawken undertook to bind his client by an agreement to compromise appellant's substantial rights, the opposing party acted at his peril in entering a consent judgment without ascertaining whether or not Hawken had authority for such action.

Precious v. O'Rourke, 270 Mass. 305, 170 N. E. 110; also Gibson v. Nelson, 111 Minn. 183, 126 N. W. 731.

III & IV.

Appellant testified that he was dissatisfied with counsel and was determined to dispense with his further services because he did not like the way the case was being handled. Due to the insistent demands of Mr. Hawken to consent to a judgment, Mr. Torrens remedied the situation by his overt act of requesting the return of the file and correspondence in the case on November 22, 1941, and so established the discharge of counsel.

Appellant had the absolute right to discharge his attorney and terminate the relationship at any time no matter how arbitrary his actions might be and it was so held in Lewis v. Canadian Pacific Railway Company, 39 Fed. 2nd 834. This right of a client is further stated in Woodbury v. Andrew Jergen Co., 69 Fed. 2nd 49, saying that the right of a client at any time to discharge an attorney so as to revoke his authority and terminate his relationship includes the right to make a change or substitution of attorneys at any stage of the proceedings either with or without cause. Indeed it has been held by this Court in Kappler v. Sumpster, 33 App. D. C. 404, that a party may change his attorney when he sees fit. The clear weight of the evidence establishes the exercise of this right by appellant.

The appellee's rights in the instant case will not be prejudiced by allowing this case to proceed to trial because, if she has a meritorious claim, not only will she be given an opportunity for her rights to be asserted, but she will be compensated accordingly. The law favors a hearing on the

merits when the parties can be put in *status quo* by the granting of such relief as would enable this to be accomplished. *Morgan v. Brothers of the Christian Schools*, 34 Calif. App. 2nd 14. (Applying Rule 60 B of Federal Rules of Civil Procedure.)

V & VI.

The judgment in the instant case was taken by the consent of appellant's former attorney and it appears from the record that the consent was pursuant to an agreement which sensibly impairs appellant's substantial rights. This, together with the establishment by the clear weight of evidence that appellant's former attorney was without authority to consent, will deny the appellant due process of law if the consent judgment is allowed to stand. That judgments of this nature should be set aside was stated in the case of *Bizzell v. Auto Tire and Equipment Company*, 182 N. C. 98, 108 S. E. 439.

Whatever may be the difficulty in defining the phrase, "due process of law," in the Constitution, when used in relation to matters of a judicial character, it is intended to secure to the citizen the right to a trial according to the forms of law, of the questions of his liability and responsibility before his person or his property shall be condemned. *Parsons v. Russell*, 11 Mich. 113, *Huber v. Reilly*, 53 Pa. 112. So in this case the appellant should have the opportunity to have a trial on the merits in order to have his liability or responsibility, if any, determined as to the appellee. In the outstanding case of *Holker v. Parker*, 7 (Cranch) U. S. 436-453, Chief Justice Marshall stated that though it may assume the form of an award or of a judgment at law, the injured party, if his own conduct has been

perfectly blameless, ought to be relieved against it. Appellant has testified at the hearing of the motion that he always believed he had a good defense to this suit and had always expressed a desire to be heard in the matter. (App. Page 8.) Would it not serve the ends of justice to allow appellant the opportunity to present this defense since no rights of the appellee will be injured by such action?

The compromise of a client's cause of action is not within the scope of appellant's attorney's general authority, express authority being required. This is so because an attorney is a special agent of his client and his duties are confined to the vigilant prosecution or defense of the client's rights, and because the power of an attorney is not coequal, coextensive or the equivalent of his client. *National Bread Company v. Bird*, 226 Ala. 40, 145 So. 462. Thus, since the evidence shows that no express authority was given appellant's former attorney, he was not in a position to consent to a judgment. Further, the clear weight of the evidence shows a termination of authority and the agency on November 22, 1941 by appellant's former attorney and thus he had no implied or apparent authority to consent to a judgment against his client after his authority had been terminated by his withdrawal from the case by agreement with his client. *Emerson-Brantingham Implement Company v. Olson*, 56 S. D. 132, 227 N. W. 567. Thus, no one was authorized to consent to a judgment on November 24, 1941, as appellant had no counsel whatsoever at that time and therefore he alone was the sole director of the destiny of the case.

CONCLUSION.

Your appellant contends, that the testimony, as given by the defendant below, together with the documentary evi-

dence in this case, coupled with the entirely unsatisfactory testimony of the defendant's former attorney, Harold F. Hawken, requires the conclusion that the Court below erred in overruling the motion to set aside and vacate the consent judgment. Thus the consent decree involved in the present case should be set aside and the former case should be reinstated upon the docket for trial and the parties should have the rights of prosecution and defense in reference thereto which they would have had before the consent decree was entered, together with any additional rights which may be germane to the litigation.

Respectfully submitted,

THOMAS B. SCOTT AND
HARVEY C. BEAVERS,
Counsel for Appellant,
1420 New York Avenue,
Washington, D. C.

APPENDIX.

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APPENDIX.

Case No. 8305

3

Answer of Defendant.

Filed August 1, 1940.

The defendant, Paul S. Torrens, answering the complaint for negligence (automobile striking automobile), filed herein by the plaintiff, respectfully states to the Court as follows:

1. This defendant admits the allegations set forth in paragraph 1 of the complaint.

2. Answering paragraph 2 of the complaint, defendant admits that he was operating an automobile in a southerly direction on Third Street, Northeast, Washington, D. C., on, to wit: March 24, 1940, and he further admits that at the time and place set forth his automobile was in collision with an automobile operated by the plaintiff, Jessie Proctor; but this defendant denies all the other allegations in said paragraph contained, and defendant specifically denies that he operated his said automobile carelessly, negligently, recklessly and unlawfully in violation of the Code of Law of the District of Columbia or of the Traffic Regulations in force in the District of Columbia.

3. Answering paragraph 3 of the complaint, this
4 defendant says that he has no knowledge as to the nature and extent of any injuries sustained by the plaintiff or as to any money paid by her as the result of said injuries; but defendant says that any injuries received and any money paid by plaintiff were in no manner attributable to any negligence on his part.

4. Answering paragraph 4, defendant says that he is not informed as to the amount of damages to Plaintiff's automobile, and that he is not responsible for any such damage since he was not guilty of any negligence in the operation of his automobile at the time of its collision with the automobile of the plaintiff.

Further answering, defendant says that he has no knowledge as to any contract of insurance which the plaintiff might have had with the Interstate Insurance Company; that he was not a party to said contract of insurance and, being guilty of no negligence in the operation of his automobile, he is not responsible for any amount of money paid by said company under said contract.

And having fully answered, defendant prays that the complaint filed herein may be dismissed.

HAROLD F. HAWKEN,
Attorney for Defendant,
416—5th Street, N. W.,
Washington, D. C.

Copy of this answer
mailed to—

William E. Carey, Jr., Esq.,
Attorney for Plaintiff,
Union Trust Bldg., this
1st day of August, 1940.

Harold F. Hawken,
Attorney for Defendant,
416-5th Street, N. W.,
Washington, D. C.

Motion to Set Aside and Vacate a Judgment.

12

Comes now the defendant Paul S. Torrens, by his attorney, Harvey C. Beavers, and moves this honorable Court to vacate and set aside the judgment in the above entitled cause, and for grounds therefore says that the said judgment was entered by his attorney, not only without authority, but against his specific instruction, and without his knowledge and consent.

PAUL S. TORRENS,
Defendant.

Points and Authorities.

Rule 60, paragraph 8, section (1) Federal rules of Civil Procedure.

Harvey C. Beavers,
Attorney for Defendant,
Evans Building,
Washington, D. C.,
Republic 2200.

13

Affidavit.

Paul S. Torrens, of legal age, after being duly sworn according to law, deposes that he is the defendant in the above entitled cause, and that he has personal knowledge of the facts herein and states as follows:

That he, the said Paul S. Torrens, was involved in a traffic accident in the District of Columbia in which the

plaintiff, named above, was the operator of the other car and that subsequent thereto he was sued in the United States District Court for the District of Columbia, that he retained an attorney, a member of the bar of this Court to defend him in this matter, that this attorney called him at his home and suggested that he, the said Paul S. Torrens, consent to a judgment against him, to which he strenuously objected.

Thereafter, becoming dissatisfied with the action of the said attorney, the defendant requested that the file be returned to him which was done and another attorney employed during the first part of December, 1941, that the substituted attorney examined the docket and informed the defendant that a consent judgment had entered against him on the 24th day of November, 1941, in the sum of \$1,160.13 and costs and another judgment entered the same date in the amount of \$89.87 plus costs "to the use of the Interstate Insurance Company" and the entry of said judgments were made not only without the knowledge and
14 consent of the said defendant but over his objection, and that this was the first knowledge of such entry being made.

The affiant further states that he has always believed and still believes that he has a good defense to this suit.

PAUL S. TORRENS,
Defendant.

City of Washington. }
 District of Columbia. } ss.:

Subscribed and sworn to before me this 23rd day of
 January, 1942.

THEODORE L. BAKER,
Notary Public, District of Columbia.

My commission expires Dec. 2, 1942.

Copy of the foregoing served by delivering same to the
 office of William E. Carey, Jr., attorney for Plaintiff,
 where the said copy was received and accepted by James
 W. Jones, an associate. Served Monday, January 26, 1942
 at 10:30 A. M. Served by W. C. Grimm.

27

Exhibit "A."

LAW OFFICES
 HAROLD F. HAWKEN
 416 5th STREET N. W.
 WASHINGTON, D. C.

Washington	Washington
NOV 22	NOV 22
10 PM	10 PM
1941	1941
D. C.	D. C.

Mr. Paul S. Torrens,
 4115 Garrison Street, N. W.,
 City.

LAW OFFICES
 HAROLD F. HAWKEN
 416 5th STREET, N. W.
 WASHINGTON, D. C.

November 22, 1941.

Mr. Paul S. Torrens,
 4115 Garrison Street, N. W.,
 City.

Dear Mr. Torrens:

At your request, I am sending herewith all of the correspondence, together with the pleadings, in your case.

Very truly yours,

(signed) H. F. HAWKEN.
 Harold F. Hawken.

Statement of Evidence.

Paul S. Torrens, the defendant herein, after being duly sworn, testified as follows:

That he was the defendant in the above cause, that he retained Mr. Harold Hawken to represent him in the matter, that subsequently Mr. Hawken telephoned him at his place of employment and stated that he had been in conference with counsel for plaintiff and had discussed settlement and suggested that he (Torrens) consent to a judgment in the sum of \$1,250.00 in the matter, to which he flatly objected and refused, that this same suggestion was made to him again and again he refused to consent; and that he had spoken to Mrs. Torrens, his wife, and she had telephoned to Mr. Hawken and added her objection to the entry of a consent judgment.

Defendant further testified that he became dissatisfied with the action of his counsel and decided to employ other counsel, accordingly he called Mr. Hawken by telephone and requested him to return his file to him, which he did by mail on the 22nd of November, 1941, which letter had inclosed the complaint, summons and other papers in the case. The said letter was mailed in an envelope postmarked November 22, 1941. (The letter, inclosures and envelope were received in evidence.) Two or three days later he retained present counsel and turned over to him all the papers received from Mr. Hawken including the envelope in which they had been received.

24 Defendant testified that about the middle of December, 1941 present counsel, Harvey C. Beavers, Esq., telephoned him at his place of employment and informed him that he had examined the Docket in the Clerk's Office of the District Court and that it revealed a judgment against him "by consent of counsel" in the total sum of \$1,250.00 entered on the 24th of November, 1941. That this was the first knowledge of any such action being taken.

Upon further examination by counsel defendant stated that not only at no time did he consent to a judgment against him in any amount, but on the contrary strenuously objected to any such action.

Question by the Court: Why did you call original counsel and request him to return your file?

Answer by defendant: I did not like the way my case was being handled, these suggestions that I consent to a judgment.

Defendant further stated that he has always believed that he had a good defense to this suit, and always expressed a desire to be heard in the matter.

Harold Hawken, Esq., a member of the Bar of the District of Columbia, after being duly sworn, testified as follows:

That he had been retained to represent the defendant and had filed an answer in his behalf, that on the day set for pre-trial of the case he had discussed with counsel for plaintiff the possibility of a consent judgment and each had agreed to submit to their respective clients a proposal

that a judgment be entered in the total sum of \$1,250.00; that counsel had announced this to the pre-trial Justice who thereupon continued pre-trial of the case from November 4th, 1941 to November 12, 1941; that he submitted the proposal to defendant by phone and he agreed that a consent judgment in the amount of \$1,250.00 be entered against him; that defendant's wife had later telephoned to him and objected to the consent judgment but after a discussion she had agreed that it was the best course to take and that prior to November 12, 1941 he had been advised by counsel for plaintiff that the settlement was agreeable to her.

25 Mr. Hawken further testified that counsel for plaintiff had advised him that he would be absent from the city on November 12, 1941 and had requested him to arrange a further continuance of the pre-trial hearing to November 24, 1941 for the entry of the order. Mr. Hawken testified that subsequently Mr. Torrens, the defendant, had telephoned him with reference to bankruptcy proceedings and had been advised that he, Mr. Hawken, would not represent him in such proceedings; that he had been asked to return his file to defendant, that the defendant had asked if he knew a Mr. Sullivan, an attorney, and he said he did.

Questions by counsel for defendant: As to whether he mailed to defendant upon request a complete file in the case on the 22nd day of November, 1941, two days prior to the entry of judgment.

Witness Hawken stated he did.

Question by counsel: As to whether he, Hawken, possessed any correspondence to or from himself and the defendant containing any indication of a consent to the entry of judgment against defendant.

Answer by Hawken: I have none.

Question by Court to Mr. Hawken: What he, Hawken, understood by the request from the defendant to return the file.

Answer by Hawken: That he thought Torrens wanted the file in connection with the proposed bankruptcy proceedings.

Mr. Hawken further testified that in his discussions with Mr. Torrens he had reviewed the evidence with him and had expressed the opinion that the proposed settlement was modest and substantially less than plaintiff could reasonably expect to recover on trial; and defendant had full knowledge that the judgment was to be entered and neither he nor his wife (who was in court) objected thereto but on the contrary consented.

William E. Carey, Jr., counsel for Jessie Proctor, plaintiff, testified as follows after being sworn:

That he is the attorney for the plaintiff; that Mr. Hawken's testimony regarding the negotiations for settlement was correct insofar as it related to negotiations with witness; that the judgment was entered on November 26 24, 1941, the day in which the case had been continued for pre-trial; that Harvey C. Beavers, of present counsel, had telephoned him on December 23 or 24, 1941, stating that he was advised that witness had been given notice of the taking of depositions under Federal Rule 69a and had summoned defendant to appear on December 26, 1941, at 4:00 o'clock, P. M., that he, Mr. Beavers, now represented the defendant and that former counsel

had no authority to enter defendant's consent to the judgment. The witness further testified that the deposition of the defendant was taken on December 26, 1941, the defendant not being represented by counsel at the taking thereof; that subsequently he caused an attachment to issue, naming defendant's employer as garnishee; that said attachment was returned by the garnishee on January 19, 1942 to the effect that it had no property or credits of the defendant; and that Mr. Beavers had phoned him on January 26, 1942, stating that he had filed a motion to set aside the judgment and had inadvertently served another attorney with the name Carey; and that on the following day a copy of said motion was served upon him.

No questions were asked by the court.

Question by counsel for defendant: Do you have any personal knowledge as to whether the defendant consented to this judgment being entered against him, or objected to it?

Answer by Mr. Carey: I do not.

HARVEY C. BEAVERS,
THOMAS B. SCOTT,
Attorneys for Defendant.

Approved and Consented to by:

WILLIAM E. CAREY, JR.,
Attorney for Plaintiff.

12

FILED OCT 2 - 1942

18 **Memo. Opinion on Motion to Vacate Judgment.**

(Filed March 19, 1942.)

Joseph W. Stewart

CLERK

Consideration of the evidence heard on the motion leads me to the conclusion that the judgment was entered upon the direction and authority of the defendant. Accordingly, the Motion will be denied.

Dated March 19, 1942.

JAMES M. PROCTOR,
Justice.

Copies mailed to all attorneys.

20

Findings of Fact.

(Filed May 21, 1942.)

That Harold F. Hawken, Esq., attorney of record for the defendant, negotiated with the attorney for the plaintiff regarding a settlement of this case by the entry of a consent judgment; that the result of these negotiations was reported to the defendant and the judgment in the total amount of \$1250.00, consented to by the attorney for the defendant, was entered with the full knowledge, consent and approval of the defendant.

Conclusion of Law.

That defendant's motion to set aside and vacate the judgment should be overruled.

JAMES M. PROCTOR,
Justice.

21 Order Overruling Motion to Vacate Judgment.

(Filed May 21, 1942.)

This action came on to be further heard at this term, and, thereupon, upon consideration thereof it is by the Court this 21 day of May, 1942.

ADJUDGED, ORDERED and DECREED that the defendant's motion to vacate the judgment herein be and the same is hereby overruled.

JAMES M. PROCTOR,
Justice.

OFFICE COPY

BRIEF AND APPENDIX FOR APPELLEE

IN THE
**United States Court of Appeals
for the District of Columbia**

APRIL TERM, 1942

—
No. 8305
—

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

PAUL S. TORRENS
Appellant

FILED OCT 22 1942

v.

Joseph W. Stewart

MRS. JESSIE PROCTOR, to Her Own Use and to the Use of
Interstate Insurance Company, a Corporation
Appellee

CLERK

—
APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF COLUMBIA
—

BRIEF FOR APPELLEE

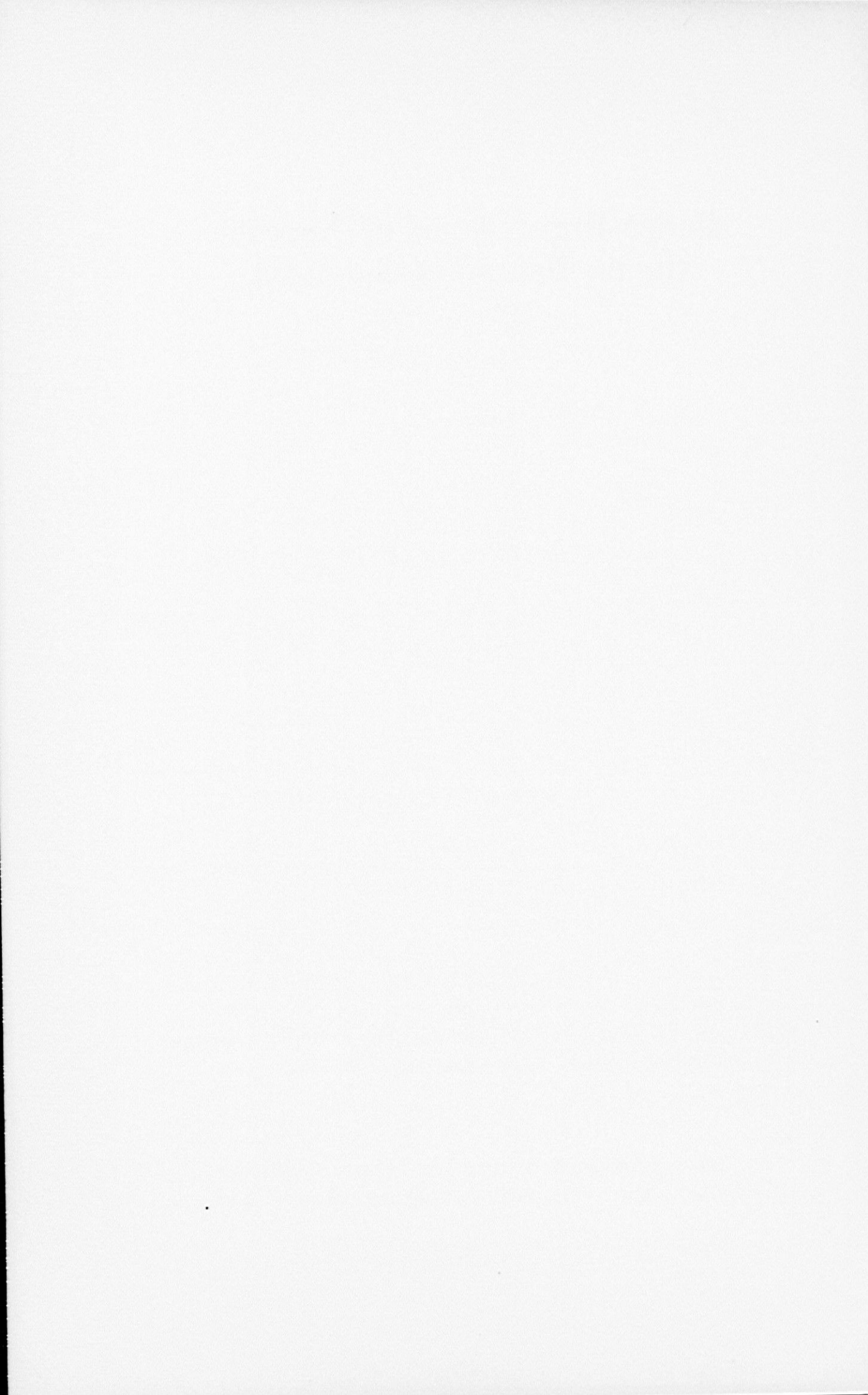
WILLIAM E. CAREY, JR.
Attorney for Appellee
Union Trust Building
Washington, D. C.

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IN THE
**United States Court of Appeals
for the District of Columbia**

APRIL TERM, 1942

No. 8305

PAUL S. TORRENS
Appellant

v.

MRS. JESSIE PROCTOR, to Her Own Use and to the Use of
Interstate Insurance Company, a Corporation
Appellee

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

Summary of Argument

I

The evidence adduced at the hearing on appellant's motion to set aside the consent judgment fully supported the finding by the Trial Court that the judgment was entered with the full knowledge and consent of appellant.

II

Findings of fact made by the Trial Court shall not be set aside unless clearly erroneous. Due regard must be given

to the opportunity of the Trial Court to judge of the credibility of witnesses.

III

The judgment of the Trial Court was not entered against appellant through his mistake, inadvertence, surprise or excusable neglect and, therefore, the Trial Court was without jurisdiction to set it aside after the expiration of the term in which it was entered.

Argument

I

The evidence adduced in the Trial Court at the hearing on appellant's motion to set aside the consent judgment fully supported the ruling of the Trial Justice.

The appellant testified (Appellant's Appendix, p. 7) that he had refused to consent to judgment being entered, and that his wife had also telephoned Harold Hawken, Esq., former counsel for appellant, and stated her objection to the entry of judgment.

Harold Hawken, Esq. testified (Appellant's Appendix, p. 8) that he had talked with the appellant by telephone and that appellant had consented to the entry of judgment, that subsequently appellant's wife had telephoned him and objected to the consent judgment, but after a discussion had agreed that it was the best course to take.

The appellant's wife was present in Court (Appellant's Appendix, p. 10). She heard the testimony of Mr. Hawken. She was not placed on the stand in rebuttal. The only inference to be drawn from her failure to testify is that Mr. Hawken's testimony was correct in every particular.

The fact that judgment was entered on November 24, 1941, while appellant's file was returned to him on November 22, 1941, is fully explained by the testimony of Mr. Hawken (Appellant's Appendix, p. 9) to the effect that the agree-

ment for judgment had been made prior to November 12, 1941, that the entry thereof was delayed only because of the absence of appellee's attorney from the city, and that he understood appellant wanted the file in connection with contemplated bankruptcy proceedings.

It will be noted that appellant engaged new counsel some time after November 22, 1942 (Appellant's Appendix, p. 7); that such counsel first had personal notice of the judgment in early December, 1941, and first contacted appellee's attorney December 23 or 24, 1941 (Appellant's Appendix, p. 10). It will be noted from the docket entries (Appellee's Appendix, p. 1) that judgment was entered November 24, 1941, that notice was given to appellant on December 22, 1941 that appellee would take his deposition pursuant to Federal Rule of Civil Procedure 69 (a) on December 26, 1941. No action was taken by appellant to forestall the taking of depositions. It will be further noted that appellee caused a garnishment to issue on January 15, 1942, directed to appellant's employer, which garnishment was returned by the garnishee to the effect that at the time of service it had no funds or credits of appellant. It will be further noted that on January 15, 1942 notice of judgment was sent to the Commissioner of Motor Vehicles in accordance with Section 40-403 of the Code of the District of Columbia (1940) (Appellee's Appendix, p. 1). Section 40-403 provides "The operator's permit and all of the registration certificates of any person, in the event of his failure to satisfy every judgment arising from an accident or accidents, happening subsequently to the effective date of this chapter (August 1, 1935), and which shall have become final by expiration, without appeal, of the time within which appeal might have been perfected * * * shall be forthwith suspended. * * * " It was only after this last action that appellant moved to vacate the judgment.

It would appear from the foregoing that appellant had consented to the judgment and abided by his consent until action was taken for its collection in a manner which hurt,

namely, the forfeiture of his driver's license in accordance with Section 40-403 of the Code of the District of Columbia (1940).

II

Federal Rule of Civil Procedure 52 (a) provides that findings of fact made by the Trial Court " * * * shall not be set aside unless clearly erroneous and due regard shall be given the opportunity of the Trial Court to judge of the credibility of witnesses. * * * " This principle, however, has always been the rule of this Court. Consolidated Realty Corporation v. Dunlap, Administrator, 72 App. D. C. 273, 114 F(2) 16; Nichols v. Gaston et al., 72 App. D. C. 186, 112 F(2) 220; Dear v. Guy, 64 App. D. C. 314, 78 F(2) 198; Potomac River Line, Inc. v. Monroe, 70 App. D. C. 215, 105 F(2) 4.

The only question before the Trial Court was one of fact—"Did Mr. Hawken consent to judgment with the knowledge and approval of appellant?"

The Trial Court saw and heard the witnesses and found the disputed facts in favor of appellee. The Court's Findings of Fact (Appellee's ^{APP'NT'S} Appendix, p. 12) and Opinion (Appellee's ^{APP'NT'S} Appendix, p. 12) were fully warranted by the evidence as set out in the statement of evidence (Appellant's Appendix, pp. 7-11).

III

The Trial Court was without jurisdiction to set aside the judgment. It was not entered against appellant " * * * through his mistake, inadvertence, surprise or excusable neglect, * * * " which would bring the case within the provisions of Federal Rule of Civil Procedure 60 (B). Rather the Trial Court found that it had been entered upon "the direction and authority of the defendant." (Appellant's Appendix, 12.) Rule 2 of the Rules of the District Court of the United States for the District of Columbia provides:

“Terms of the general term and of each division of the court shall begin on the first Tuesday of January, April, July, and October * * *” The judgment was entered November 24, 1941 during the October, 1941 term (Appellee’s Appendix, p. 1). The motion to set aside the judgment was filed January 23, 1942 during the January, 1942 term.

“ * * * a court cannot reverse or annul its own final decrees or judgments after the close of the term in which they have been rendered, unless for clerical errors or to reinstate a cause dismissed by mistake. *Polk & Co. v. Smolik*, 44 App. D. C. 55, 43 Wash. Law Rep. 710 * * * *United States v. Mayer*, 235 U. S. 55.”

Taliaferro v. Carter, 63 App. D. C. 304, 72 F(2) 172. Followed in *Verkouteren et al. v. Edwards*, — App. D. C. —, 128 F(2) 33, 70 Wash. Law Rep. 784.

Conclusion

Appellee respectfully contends that the judgment of the Trial Court overruling appellant’s motion to set aside the consent judgment entered November 24, 1941 was in no respect erroneous and should be affirmed.

WILLIAM E. CAREY, JR.
Attorney for Appellee
Union Trust Building
Washington, D. C.

APPENDIX

**CIVIL DOCKET
PROCEEDINGS**

1940

* * * *

July 15 Complaint and jury demand filed

* * * *

Aug. 1 Answer of Defendant and Appearance of Harold F. Hawkins filed

Nov. 4 Calendared

1941

Nov. 24 Stipulation as to judgment filed

Nov. 24 Judgment by order of Court for Jessie Proctor in the sum of \$1160.13 and judgment to the use of the Interstate Insurance Co. in the sum of \$89.87—both with costs, Proctor, J.

Dec. 22 Notice of taking of deposition of Plf. filed

1942

Jan. 15 Report of judgt. to Traffic Bu., copy filed

* * * *

Jan. 15 Attachment writs (2) Int. (2) issued and deposit

* * * *

Jan. 19 Answer of Galliher & Huguely Inc. Garnishee filed

Jan. 23 Motion to set aside judgment; P & A; Affidavit

Jan. 23 Enter appearance of Beavers for Deft.

* * * *

Mar. 3 Supplemental return of service filed

Mar. 19 Memo opinion denying deft's motion to vacate judgment—Proctor, J.

Mar. 30 Appearance of Thomas B. Scott for Defendant filed

May 21 Findings of Fact & Conclusions of Law—Proctor, J.

May 21 Order, Overruling Motion to Vacate Judgment—Proctor, J.

* * * *